

Licensing and Zoning Regulations

Medical Marijuana – Dispensaries and Collective Gardens

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Objectives

- Consider the status of the law and how it relates to a local jurisdiction's regulatory options.
- Learn the basics of how to implement moratoria and interim zoning to preserve regulatory options.
- Learn how other jurisdictions are regulating dispensaries and collective gardens.

Definitions – Dispensaries

Dispense: the selection, measuring, packaging, labeling, delivery or retail sale of cannabis by a licensed dispenser to a qualifying patient or designated provider.

Licensed Dispenser: a person licensed to dispense cannabis for medical use to qualifying patients and designated providers by the department of health . . .

Governor vetoed both definitions in ESSSB 5073.

Definitions –

- Designated care provider: person 18 yrs or older, designated in written document signed and dated by a Qualified Patient to serve as a Designated Provider and is in compliance with chapter 69.51A RCW.
- Qualifying patient: patient of health care professional; diagnosed by that HCP as having a terminal or debilitating medical condition, resident of WA at the time of diagnosis, has been advised that he/she may benefit from medical cannabis, is in compliance with 69.51A RCW.

Definitions – Collective Gardens

- Collective Gardens: Qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use.

Restrictions on Collective Gardens

- No more than 10 qualifying patients may participate in one collective garden at any time;
- A collective garden may contain no more than 15 plants per patient up to 45 plants;

Restrictions on Collective Gardens, cont.

A collective garden may contain no more than twenty-four ounces of usable cannabis per patient up to a total of seventy-two ounces of usable cannabis;

A copy of each qualifying patient's valid documentation or proof of registration and the patient's proof of identity must be available at all times on the premises of the collective garden;
and

Restrictions on Collective Gardens, cont.

No usable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden.

RCW 69.51A.085

Additional Restrictions

- It is a class 3 civil infraction to use or display medical cannabis in a manner or place that is open to the view of the general public.
- Chapter 69.51A does not require accommodation of any on-site medical use of cannabis in any place of employment, in any school bus or any school grounds, in any youth center, in any correctional facility, or smoking cannabis in any public place or hotel or motel.

RCW 69.51A.060



Are dispensaries legal?

State law does not allow dispensaries.

Dispensaries are illegal under the Controlled Substances Act.

No moratorium needed to address dispensaries, if city simply considers them illegal.

Authority of cities and counties

- May adopt and enforce any of the following relating to the production, processing, or dispensing of cannabis or cannabis products:
 - Zoning Requirements
 - Business Licensing Requirements
 - Health & Safety Requirements
 - Business Taxes.
- RCW 69.51A.130.

Will city and county employees be subject to prosecution?

- Justice Department and DEA have made it clear that dispensaries and licensed MJ growers could be prosecuted for violating CSA and money laundering laws.
- Feds have stepped up prosecution regardless of 2009 memo from Justice Department in which feds stated that “certain marijuana users and providers would be a lower priority for prosecution than others.
- Warning letter from DEA to Clark County Commissioners dated 1-17-12.

Immunity from state prosecution.

- No civil or criminal liability may be imposed by any court on cities, towns and counties or other municipalities and their officers and employees for actions taken in good faith under . . . and within the scope of their assigned duties.

RCW 69.51A.130(2).

Should we adopt a moratorium?

- A moratorium is an emergency measure adopted without notice to the public or public hearings, designed to preserve the status quo while the city officials consider new regulations to respond to new or changing circumstances not addressed in current laws.
- Consider the issue whether medical cannabis dispensaries are legal? (Is legislative action by the State needed?)
- What zoning regulations should be adopted for dispensaries?
- What business licensing regulations should be adopted for dispensaries?

Official/Officer/Employee Liability

- Is there immunity under the Controlled Substances Act for municipal implementation of state law, such as ordinances addressing medical marijuana collective gardens?
- Enforcement officials could claim immunity under 21 U.S.C. Sec. 885(d) of CSA, which immunizes local official “lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

Should we adopt interim zoning?

- Interim zoning: city or county adopts a zoning ordinance in response to an emergency situation to regulate use of land pending amendments to the zoning code. Interim zoning regulations may be appropriate for collective gardens because:
 - RCW 69.51A.085 allows collective gardens.
 - Many of the land use impacts of collective gardens are known (review of ordinances from other jurisdictions).
 - Zoning ordinance can address location; business licensing can address operation.
 - Permit requirements not recommended.

Interim Zoning

- Follow the same procedures for moratoria (GMA cities RCW 36.70A.390; code cities RCW 35A.63.220; other cities and towns RCW 35.63.200).
- Adoption of emergency clause – prevent use from locating in violation of ordinance and then later claiming “grandfathering” or nonconforming use.
- Special procedures for hearing, voting, length of time that interim zoning may be in effect.
- Extensions subject to same statutory rules.

Procedure - Moratorium

- Immediate adoption, no notice or public hearing for adoption.
- Emergency adoption procedures usually require majority plus one of entire council.
- Emergency clause must describe need for immediate adoption – risk of creation of legal nonconforming uses
- Set date for public hearing on moratorium within 60 days after adoption.

Procedure – Moratorium

- At public hearing, have staff report on secondary land use impacts of medical cannabis dispensaries.
- Comply with SEPA – Emergency action WAC 197-11-880
- Send copy of moratorium to Dept. of Commerce (GMA)
- Accept public testimony.
- Decide whether to keep moratorium in place for 6 months – 1 year if a work plan is developed.
- Immediately adopt findings to support moratorium.

Procedure – Moratorium

- During moratorium period:
 - Research secondary land use impacts of the use that have been noted by other jurisdictions throughout the country.
 - Research ways to address negative aspects of such secondary land use impacts.
 - Review ordinances adopted by other jurisdictions.
 - Contact other jurisdictions to find out whether their regulations adequately address the negative aspects of the secondary land use impacts.

Procedure – Moratorium

- During moratorium period, cont.
 - Check status of law, which keeps changing.
 - Draft zoning ordinance to address secondary impacts, considering comments of all departments, including building, fire, planning, police, etc.
 - SEPA Responsible Official issues threshold decision.
 - Send draft ordinance to Dept. of Commerce.
 - Planning Commission holds hearings.

Procedure – Moratorium

- Most conservative approach – no permit.
- City Council considers draft ordinance.
- City Council adopts ordinance.

Procedure – Interim Zoning

- Same as for adoption of moratorium.
- However, interim zoning ordinance should contain zoning regulations applicable to collective gardens.
- Can be repealed at any time and new zoning ordinance adopted.

What should we consider when drafting regulations?

- Location? Should the use be confined to one zoning district or should it be allowed in all zoning districts?
- Separation? Should the use be separated from other “sensitive” uses, such as schools and youth-oriented facilities?
- Location and Separation? Should the use be confined to one zoning district AND separated from sensitive uses?
- Should the medical cannabis use be separated from other medical cannabis uses?

What should we consider when drafting regulations?

- Zoning Regulations
- Business Licensing Requirements (not recommended)
- Health & Safety Requirements (nuisance)
- Business Taxes (not recommended)

Zoning Regulations

Consider secondary land use impacts:

LIGHT

NOISE

TRAFFIC

SIGNS

SECURITY

SIZE LIMITS

Land Use Impacts

- LIGHT ISSUES.

Cannabis grown indoors requires excessive use of electricity – risk of fire.

Cannabis grown outdoors may use lights at night, which could impact neighbors. Shield lights.

Lack of lighting around property may hide criminal activity.

Land Use Impacts

- ODOR

Strong smell of cannabis plants growing outdoors may be an attractive nuisance – alerting persons to the presence of growing plants. Creates risk of burglary, robbery.

Strong smell of cannabis plants growing outdoors may be offensive to neighbors.

No “accommodation” for any on-site medical use of cannabis in any place of employment, school bus, school grounds, youth center, correctional facility, public place, hotel or motel. (RCW 69.51A.060.)

Land Use Impacts

- NOISE
 - Is the lighting system for the collective garden powered by diesel or gas generators?

Land Use Impacts

- SECURITY.
 - Fence outdoor Collective Gardens.
 - Lockable Gates.
 - Alarm System.
 - Bars on windows in areas where Collective Garden is indoors.
 - Don't allow Collective Gardens in residential zones.

Land Use Impacts

- SIZE LIMITS
 - Only one Collective Garden per legal parcel.
 - Only 45 cannabis plants.
 - Limitation on square footage devoted to Collective Garden on legal parcel.
 - Separate Collective Gardens from other Collective Gardens in zoning ordinance?

Land Use Impacts

- SIGNS
 - No signs designating the site to be a Collective Garden for growing medical cannabis.
 - Site addressing only.

Zoning Regulations

- PERMIT REQUIREMENTS.

Should we have a requirement for a permit?

How will we enforce the ordinance without a permit requirement?

Individual Cultivation

- What requirements are imposed for individual Qualifying Patient who cultivates or possesses no more than 15 plants or no more than 24 ounces of usable medical cannabis for personal use?*

* Other requirements apply – see RCW 69.51A.040.

Public Record Requests

- If there is no permit or business license requirement for collective gardens, it is less likely that people will ask for public records from the city (permit applications, application materials).

May be interested in joining collective garden, but

May be interested in knowing location of collective garden to steal plants.

Nuisance Regulations

- City identifies any violation of the Collective Gardens ordinance to be a public nuisance and subject to the enforcement process.
- Provided that: NO duty to enforce. Enforcement is performed according to discretion of official, depending on the severity of the violation and available funds.

Nuisance Regulations.

- Issuance of Notice of Violation under code.
- Hearing before hearing officer.
- Decision on Notice of Violation. Imposition of fines.
- Appeal to court; or if no appeal, then
- Abatement of nuisance in superior court.

Moratoria/Zoning Ordinance Defects

- Failure to include definitions.
- Failure to follow procedure, including following the procedure for the vote on emergency adoption.
- Assumption that moratoria can be automatically extended without further action.
- Adoption of “rolling moratoria” with no action by staff to draft “permanent” zoning regulations.

Legal Issues

- Who knows what Washington courts will do?
- Is the State Medical Marijuana law preempted by the CSA?
- Will local regulations be found to be preempted by the State Medical Marijuana law?
- Will local regulations be found to be preempted by the CSA?
- Can a city ban all medical marijuana uses?

Legal Issues, cont.

- Can a city adopt an ordinance that allows collective gardens, but allows less plants in a collective garden than State law?
- Can a city establish a permit scheme or a lottery system that limits the number of collective gardens that may locate in the city?
- Can a city adopt a permit fee that exceeds the city's administrative costs associated with enforcement?
- Can a city decide to simply do nothing?

Questions?

